No. 87-556

Supreme Court, U.S.
FILED
NOV 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM LEIGHTON,

Petitioner,

– against –

BERNARD POGOSTIN,

Respondent,

– against –

UNIROYAL, INC., ROSS BARZELAY, DAVID BERETTA, NORBORNE BERKELEY, JR., E. PAUL CASEY, FREDERICK COLOMBO, E. RAYMOND COREY, JOSEPH P. FLANNERY, ALLEN J. KROWE, HORACE G. McDONNEL, JR., BURNELL R. ROBERTS, HOWARD B. WNETZ, JR., and W. THOMAS YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF OF RESPONDENT BERNARD POGOSTIN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

SIDNEY B. SILVERMAN
Counsel of Record
SILVERMAN & HARNES
135 East 36th Street
New York, New York 10016
(212) 684-3333

KLINGER, NICOLETTE, MAVROUDIS & HONIG
550 Kinderkamack Road
Oradell, New Jersey 07649
(201) 262-3000

Attorneys for Respondent Bernard Pogostin

November 3, 1987

QUESTIONS PRESENTED

1. Was CDU, a company whose sole assets consisted of the securities issued by its majority owned subsidiary, Uniroyal, an investment company under the Investment Company Act of 1940, where Uniroyal was a tire manufacturer and not an investment company?

2. Was the Equal Protection Clause violated by the determination by the New Jersey state court that a purported objector to a class action and stockholder derivative suit lacked standing to object, and by the rejection by that court of the objector's claim that the plaintiff in the lawsuit was not a proper plaintiff?

PARTIES TO THE PROCEEDINGS BELOW

All of the parties to the proceedings below are listed in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PARTIES TO THE PROCEEDINGS BELOW	ii
STATUTES AND RULES	viii
STATEMENT OF THE CASE	2
A. Background of the Action	5
B. The Settlement Agreement	7
C. Petitioner's Objections To The Settlement	8
SUMMARY OF ARGUMENT	15
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	16
I	
THE NEW JERSEY APPELLATE DIVISION CONSIDERED AND PROPERLY REJECTED PETITIONER'S CLAIMS UNDER THE INVESTMENT COMPANY ACT OF 1940	16

Page

II

THE NEW JERSEY APPELLATE DIVISION'S DETERMINATION THAT THE PETITIONER LACKED STANDING AND ITS REJECTION OF PETITIONER'S CLAIM THAT THE PLAINTIFF LACKED STANDING, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE 20

III

THE REMAINING ARGUMENTS IN THE PETITION ARE WITHOUT MERIT 24

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

Andre v. Merill Lynch Realty Assets, 97 F.R.D. 699 (S.D.N.Y. 1983) 29,30

Beatrice Companies, Inc., Del. Supra., 155, 156, 1986 Christie, C.J., Horsey and Moore, J.J. (Feb. 20, 1987). 14

Beef Industry Antitrust Litigation, F.2d 195 (5th Cir. 1981). 22

Jezarian v. Csapo, 483 F.Supp. 385 (S.D.N.Y. 1979). 28

Leighton v. One William Street Fund, Inc., 343 F.2d 865 (2d Cir. 1965). 13

Leighton v. One William Street Fund, Inc., [67-69] CCH Fed. Sec. L. Rep., par. 92, 195 (S.D.N.Y. 1968) aff'd 404 F.2d 351 (2d Cir. 1968) Cert. denied 89 S. Ct. 1467 (1969). 13

Leighton v. Paramount Pictures Corporation, 340 F.2d 859, 861 (2d Cir. 1965). 13

	Page
Leighton v. Sec., 221 F.2d 91 (D.C. Cir. 1955).	12
Mid Atlantic Toyota Antitrust Litigation, 564 F.Supp. 1379 (D. Md. 1983).	22
Orzech v. Englehart, 195 A.2d 375 (Del. Ch. 1963).	20
Progress Development Corp. v. Mitchell, 286 F.2d 222, 232 (7th Cir. 1961).	20
United Asset Management Corp., [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 77,088, at 77,744 (SEC NO-ACTION LETTER Nov. 27, 1981).	20
STATUTES & RULES	
Investment Company Act of 1940.	15
Investment Company Act Sec. 42(e)	26
Investment Company Act Sec. 49	26
New Jersey Statute, N.J.S.A. 14A: 3-6(3)	23
New Jersey Rules:	
R. 1:20-1(b), 1:28-2.	xiii
R. 1:21-1.	xiiii
R. 1:21-(a)	xiii
R. 1:21-2	xii
R. 2:11-3(e) (1) (E).	17

	Page
U.S. Const. art. VI § 2.	16
15 U.S.C. § 80a-41(e)	26
15 U.S.C. § 80a-48	26
15 U.S.C. § 80a-7(a) (5)	16
15 U.S.C. § 80a-3a-3	18
15 U.S.C. § 80a-3b-1	20
F.R. Civ. Proc. Rule 11.	29

STATUTES AND RULES

Investment Company Act of 1940, as amended 15 U.S.C. Sec. 80(a):

Sec. 3(a). When used in this title, "investment company" means any issuer which:

(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis. As used in this section, "investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by

majority-owned subsidiaries of the owner which are not investment companies.

* * * *

Sec. 42(e). Whenever it shall appear to the Commission that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this title, or of any rule, regulation, or order hereunder, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order hereunder. Upon a showing that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction or de-

cree or restraining order shall be granted without bond. In any proceeding under this subsection to enforce compliance with section 7, the court as a court of equity may, to the extent it deems necessary or appropriate, take exclusive jurisdiction and possession of the investment company or companies involved and the books, records, and assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, who with the approval of the court shall have power to dispose of any or all of such assets, subject to such terms and conditions as the court may prescribe. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this title, or of any rule, regulation, or order thereunder, to the Attorney General who, in his discretion,

may institute the appropriate criminal proceedings under this title.

* * * *

Sec. 49. Any person who willfully violates any provision of this title or of any rule, regulation, or order hereunder, or any person who willfully in any registration statement, application, report, account, record, or other document filed or transmitted pursuant to this title or the keeping of which is required pursuant to section 31(a) makes any untrue statement of a material fact or omits to state any material fact necessary in order to prevent the statements made therein from being materially misleading in the light of the circumstances under which they were made, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both; but no person shall

be convicted under this section for the violation of any rule, regulation, or order if he proves that he had no actual knowledge of such rule, regulation, or order.

* * * *

New Jersey Rules of General Application

1:21-2. Appearances Pro Hac Vice (a) Conditions for Appearance. An attorney of any other jurisdiction, of good standing there, whether practicing law in such other jurisdiction as an individual or a member or employee of a partnership or an employee of a professional corporation authorized to practice law in such other jurisdiction, or an attorney admitted in this state, of good standing, who does not maintain in this state a bona fide office for the practice of law may, at the discretion of the court in which any matter is

pending, be permitted, pro hac vice, to speak in such matter in the same manner as an attorney of this state who is domiciled in and maintains a bona fide office for the practice of law in this state or maintains in this state his principal office for the practice of law and who is therefore, pursuant to R. 1:21-(a), authorized to practice in this state. No attorney shall be admitted under this rule without complying with R. 1:20-1(b) and R. 1:28-2. An application for admission pro hac vice shall be made on motion to all parties in the matter and shall be supported by an affidavit or certification of the attorney stating that:

(1) he is a member in good standing of the bar of the highest court of the state in which he is domiciled or

has his principal office for the practice of law;

(2) he is associated in the matter with New Jersey counsel of record qualified to practice pursuant to R. 1:21-1;

(3) the client has requested that he be represented by said attorney; and

(4) there is good cause for such admission, which may include:

(i) the cause in which he seeks admission involves a complex field of law in which he is a specialist, or

(ii) there has been an attorney-client relationship with the client for an extended period of time, or

(iii) there is a lack of local counsel with adequate expertise in the field involved, or

(iv) the cause presents questions of law involving the law of the foreign jurisdiction in which the applicant is licensed, or

(v) there is need for extensive discovery or other proceedings in the foreign jurisdiction in which the applicant is licensed, or

(vi) such other reason as would present good cause for the pro hac vice admission.

No. 87-556

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM LEIGHTON,

Petitioner,

-against-

BERNARD POGOSTIN,

Respondent,

-against-

UNIROYAL, INC., ROSS BARZELAY, DAVID BERETTA, NORBORNE BERKELEY, JR., E. PAUL CASEY, FREDERICK COLOMBO, E. RAYMOND COREY, JOSEPH P. FLANNERY, ALLEN J. KROWE, HORACE G. McDONNEL, JR., BURNELL R. ROBERTS, HOWARD B. WENTZ, JR., and W. THOMAS YORK,

Respondents.

-------*------

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

-------*------

BRIEF OF RESPONDENT BERNARD POGOSTIN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

In September, 1985, the Respondents herein entered into a memorandum of understanding[1] settling common law class and stockholder derivative claims in an action between Respondent Bernard Pogostin, as plaintiff, and the remaining Respondents, as defendants, pending in the New Jersey Superior Court. The claims were brought derivatively on behalf of Uniroyal, Inc. ("Uniroyal") and on behalf of a class consisting of all owners of Uniroyal's preferred stock. The settlement memorandum received wide publicity in the press. The New Jersey Superior Court directed that notice of the proposed settlement be given to the

---

1. 59a-69a. References consisting of a number followed by the letter "a" are to the appendix annexed as part of the Petition.

class by mail and that a short form notice be published in the press, and directed that a hearing on the settlement be held on November 21, 1985.[2]

Petitioner read about the proposed settlement and purchased five shares of the preferred, on or about November 15, 1985[3], at a cost of about $250, for the express purpose of opposing the proposed settlement. Petitioner, however, did not oppose the settlement in order to benefit the class, which he had attempted to join only six days before the settlement hearing. Rather, his purpose in opposing the settlement was to benefit only himself. In a letter to Respondents' attorneys, Petitioner offered to withdraw his opposition to the settlement in

---

2. 26a-30a.

3. 30a.

exchange for the payment to him of $25,000.[4] Respondents rejected this extortionate demand. Petitioner then prosecuted an appeal from the Judgment[5] of the Superior Court approving the settlement, and after the dismissal of that appeal[6], petitioned the New Jersey Supreme Court for Certification. The petition was denied.[7] In addition, Petitioner made numerous motions in the New Jersey Appellate Division and Supreme Court, and took advantage of his pro se status, all for the purpose of postponing the finalization of the settlement. This Petition is Petitioner's last attempt to delay the settlement.

---

4. 1r-6r. References consisting of a number followed by the letter "r" are to the appendix annexed hereto.

5. 10a-18a.

6. 19a-53a.

7. 56a.

A. Background of the Action

In April, 1985, Carl Icahn ("Icahn") announced a cash tender offer at $18 per share, for a sufficient amount of Uniroyal, Inc. ("Uniroyal") common stock to raise his holdings to 53% of Uniroyal's outstanding common. Icahn proposed to obtain the remaining 47% by merger. The directors of Uniroyal opposed the tender offer on several grounds, and a proxy contest and litigation ensued. A "standstill" arrangement was entered into, following which it was agreed that Uniroyal would acquire all outstanding shares of its common stock at $22 per share, and Uniroyal would thereafter be entirely owned by CDU Holding, Inc. ("CDU"). The $22 price was established in negotiations with Icahn, who owned more than 3,165,600 shares of Uniroyal common

stock. Icahn was to receive the same $22 for his shares as the public received for theirs.

Although the purchase plan made provision for the common stockholders, none was made for Uniroyal's preferred stock. Respondent Pogostin, an owner of preferred stock, commenced an action on behalf of all Uniroyal preferred shareholders. He contended that the plan was, in economic effect, a liquidation, and that the preferred stock should be redeemed at $100 per share, or alternatively, receive its liquidation preference of $100. The defendants contended that the reorganization was, in fact, a merger, and that Uniroyal was not required to redeem or pay a liquidation preference to the preferred stock.

B. The Settlement Agreement

After discovery had been completed, expert witness reports and pretrial briefs prepared, and a firm trial date obtained, the parties entered into a settlement agreement.

The settlement effected a change in the preferred dividend from non-cumulative to cumulative, and provided for its mandatory redemption at $100 per share commencing in 1995. The terms of the settlement were thereafter accelerated by the actual liquidation of Uniroyal, and in 1986, the preferred stockholders received $100 per share plus an $8 dividend, representing the full recovery sought in the litigation. Thus, the settlement and subsequent events have secured for Uniroyal preferred stockholders, the maximum recov-

ery which they could possibly achieve under law.

C. Petitioner's Objections To The Settlement

Petitioner, as noted, purchased Uniroyal stock to oppose the settlement. At a hearing held on November 21, 1985, to determine whether the settlement should be approved, Petitioner stated that the class settlement was "good" and "should be put through". However, Petitioner asserted that Icahn had received "greenmail" from Uniroyal, and that the release issued in connection with the settlement should not release Icahn from any claim in connection with the alleged "greenmail" payment.

In making the aforesaid contention, Petitioner ignored the fact that the release issued in connection with the settlement does not release

Icahn from any claim. It releases only the defendants and entities related to CDU. (70a-72a) Also, Icahn received exactly the same $22 per share price for his stock which was paid to the public shareholders. Since the price paid to Icahn for his stock could not give rise to a "greenmail" claim, Petitioner argued that Uniroyal's reimbursement of $5,900,000 of Icahn's expenses incurred in connection with his attempt to acquire Uniroyal was a "greenmail" payment.

However, the record reflects that Icahn's expenses actually exceeded $10 million. Icahn, in pursuing Uniroyal, had retained an investment banking firm, engaged in litigation and obtained a line of credit from a bank. Uniroyal took the same steps in opposing Icahn, at a cost of about $22 million.

Icahn's expenses of $10 million are modest in light of Uniroyal's expenses.

Thus, the $5.9 million payment failed to cover Icahn's expenses, and left him with a $4.1 million deficit. Far from receiving a "greenmail" payment, Icahn received only partial reimbursement of his expenses and exactly the same price per share as did all the other Uniroyal stockholders.

Based upon the submissions made at the hearing and the trial judge's intimate knowledge of the action, he approved the settlement.(10a-18a) Thereafter, Petitioner filed an appeal. An inquiry was made to Petitioner to determine his reason for the filing of said appeal. In a letter to all parties, dated February 16, 1986, Petitioner showed his hand. He stated that he was willing to abandon his

appeal upon payment of $25,000 to him by "certified or cashier's check". He enclosed a stipulation dismissing his appeal and directing the payment to him of $25,000, which he urged the attorneys for the parties to sign.[8]

In the aforesaid letter, Petitioner sought to justify his request for a fee. He argued that as a result of his delaying tactics, payment by Uniroyal of the fees awarded by the trial court had been held up, without interest, and Uniroyal had had the use of such funds during the period of delay:

> "Uniroyal may benefit from the appeal because there is no judgment requiring it to pay $150,000 to plaintiff's expert, M.J. Whitman & Co., Inc. The judgment is for $600,000 only, representing at $200 per

---

8. 1r - 6r.

> hour, 3,000 hours of work. Uniroyal has already benefited to the extent of some $10,000 representing interest at 7% on the $600,000 which it has not yet paid in satisfaction of the judgment.
>
> Should you agree to the terms of the proposed stipulation or should you have alternative proposals, please sign and return to me this document for submission to the appellate court for action under R. 2:8-2. As I read the rule, no order of the appellate court is necessary for the approval of the stipulation."

This is not the first time that Petitioner has engaged in nuisance suits. Since the 1950's, he has been the subject of judicial opinions sharply criticizing his abusive and frivolous litigation.[9] Nor is this the first time

---

9. See, Leighton v. SEC, 221 F.2d 91 (D.C. Cir. 1955); Leighton v. One William Street Fund, Inc., 343 F.2d 865

that Petitioner has abused the legal system. As the United States Court of Appeals for the Second Circuit observed in upholding an order holding Petitioner in contempt:

> "Here Leighton was an habitual pro se litigant whose claims were often conclusory and lacking in legal merit."[10]

In addition, this is not the only instance in which Petitioner has purchased stock solely for purposes of suit. Indeed, very recently, the Supreme Court of Delaware rejected Petitioner's appeal from a settlement involving the Beatrice Company, Inc. on

---

(2d Cir. 1965); Leighton v. One William Street Fund, Inc., [67-69] CCH Fed. Sec. L. Rep., par. 92,195 (S.D.N.Y. 1968) aff'd 404 F.2d 351 (2d Cir. 1968) cert. denied 89 S.Ct. 1467 (1969).

10. Leighton v. Paramount Pictures Corporation, 340 F.2d 859, 861 (2d Cir. 1965).

the ground that he lacked standing, since he had purchased stock for the purpose of opposing the settlement.[11]

In this case, the Appellate Division of the Superior Court of New Jersey dismissed Petitioner's appeal on the merits. 523 A.2d 1078 (1987). (19a-53a). That Court held that Petitioner lacked standing to object to the settlement or prosecute an appeal from the approval of the settlement, and that in any case, the Petitioner's arguments were without merit. Petitioner's motion for reconsideration by the Appellate Division was denied on March 12, 1987. (54a) His petition to the Supreme Court of New Jersey for certification was denied by order filed July 9, 1987. (56a)

---

11. In Re Beatrice Companies, Inc., Del. Supr., 522 A.2d 865 (1987).

SUMMARY OF ARGUMENT

The petition raises no issue warranting review by the Court. The Petitioner's claim that CDU is an investment company under the Investment Company Act of 1940 was properly rejected by the Appellate Division of the Superior Court of New Jersey as were the Petitioner's other objections to the settlement. Further, the Appellate Division's determination that Petitioner lacked standing, but that respondent Pogostin was a proper plaintiff, does not implicate the Equal Protection Clause.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

THE NEW JERSEY APPELLATE DIVISION CONSIDERED AND PROPERLY REJECTED PETITIONER'S CLAIMS UNDER THE INVESTMENT COMPANY ACT OF 1940

The Petitioner states, as one of his grounds for the grant of the writ, that the New Jersey courts disregarded their duties under Article VI, Section 2 of the Constitution of the United States to test under the Investment Company Act of 1940 (the "ICA"), the acquisition by CDU of Uniroyal. The Petitioner argued below that, as a result of such acquisition, CDU became an investment company prohibited by Section 7 (a)(5) of the Act, 15 U.S.C. § 80a-7(a)(5) from controlling Uniroyal.

Petitioner's claim that the New Jersey courts failed to consider

this argument is without basis. The Appellate Division, after holding that Petitioner lacked standing to object to the settlement, stated as follows:

> "Even if we were to ignore Leighton's lack of standing to object to the settlement and prosecute this appeal, we are nevertheless convinced that the judgment under review should be affirmed. Our study of the record in light of the arguments presented satisfies us that Judge Lester did not mistakenly exercise his discretion by approving the settlement agreement concerning the merger and restructuring of Uniroyal and that all of the issues of law raised with respect thereto are clearly without merit. R.2:11-3(e)(1)(E)." (52a)

Thus, the Appellate Division clearly considered all the Petitioner's argu-

ments. It was not required to address each of them independently.

The Appellate Division's summary dismissal of the Petitioner's argument that the ICA was violated was fully justified. That argument is so clearly lacking in merit as to demonstrate, in and of itself, the Petitioner's bad faith and dilatory motive. Section 3(a)(3) of the ICA, 15 U.S.C. § 80a-3a-3, in relevant part, defines an investment company as any issuer which:

> "(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities have a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated

> basis. As used in this section "investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which are not investment companies." (emphasis supplied)

Here, it is beyond dispute that CDU is not an investment company as claimed by Petitioner, because it does not own any "investment securities." CDU's only asset is the common stock of its wholly-owned subsidiary, Uniroyal. Because Uniroyal is a manufacturing and marketing business, not an investment company, Uniroyal stock is patently not an "investment security" within the

meaning of Section 3(a) (3).[12] Accordingly, Petitioner's argument is a totally frivolous one.

II

THE NEW JERSEY APPELLATE DIVISION'S DETERMINATION THAT THE PETITIONER LACKED STANDING AND ITS REJECTION OF PETITIONER'S CLAIM THAT THE PLAINTIFF LACKED STANDING, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

The Appellate Division, in a lengthy and well-reasoned decision, held that the Petitioner, who purchased his stock after the settlement to which he objected, lacked standing to object

---

12. Moreover, CDU is entitled to the exemption provided by Section 3 (b) (1) of the ICA, 15 U.S.C. Sec.80a-3b-1 which excludes from the coverage of the Act companies that are engaged, directly or indirectly, in businesses other than investing and trading in securities. See Orzech v. Englehart, 195 A.2d 375 (Del. Ch. 1963). See United Asset Management Corp., [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) par. 77,088, at 77,744 (SEC No-Action Letter Nov. 27, 1981); Progress Development Corp. v. Mitchell, 286 F.2d 222, 232 (7th Cir. 1961).

thereto or prosecute an appeal from the Superior Court's approval thereof. The Appellate Division also rejected Petitioner's argument that Respondent Pogostin lacked standing to bring this suit. Petitioner now argues that the Appellate Division violated the Equal Protection Clause by ruling that he lacked standing, but failing to determine that Respondent Pogostin had it. This argument is frivolous. As noted earlier, the Appellate Division decided in its opinion that all the "issues of law raised with respect" to the settlement were without merit. (52a) Thus, there was no "discrimination".

Moreover, Petitioner's attack on Respondent Pogostin's standing clearly lacked a valid basis. Respondent Pogostin submitted sworn tes-

timony that he acquired his Uniroyal preferred in November, 1978, more than six years prior to the events in issue. Respondent Pogostin was certified as class representative for settlement purposes only, and there is nothing improper about the procedure used below in the context of a settlement.[13] Certain factors which a court must generally consider in determining whether a plaintiff should be certified as class representative for litigation purposes, are irrelevant in the context of a settlement. For example, the plaintiff's ability to finance the litigation is not relevant, where the litigation is being settled. Further, the trial judge held a hearing on the settlement at which

---

13. See e.g., In re Beef Industry Antitrust Litigation, F.2d 195 (5th Cir. 1981); In re Mid Atlantic Toyota Antitrust Litigation, 564 F. Supp. 1379 (D.Md. 1983).

Petitioner and others had the opportunity to raise any matters deemed relevant to Respondent Pogostin's certification for settlement purposes. No objection to such certification was made below.

Further, Petitioner argues that under New Jersey law, Respondent Pogostin would lack standing to sue derivatively unless his Uniroyal preferred had a market value of over $25,000 or he posted security. Petitioner has misstated New Jersey law. N.J.S.A. 14A:3-6(3) provides that in a derivative suit, if the plaintiff's shares are worth less than $25,000, the corporation on whose behalf the derivative suit is brought "shall be entitled . . . to require the plaintiff . . . to give security for the reasonable expenses, including fees of attorneys,

that may be incurred by it . . . . " There is no requirement that security be demanded or posted at the time suit is brought.

III

THE REMAINING ARGUMENTS IN THE PETITION ARE WITHOUT MERIT

In addition to the arguments discussed above, the Petition contains a potpourri of misstatments of law and fact. At page 23 of the Petition, the Petitioner speculates that Respondent Pogostin had advance knowledge of the plan for CDU to acquire Uniroyal at $22 per share, because the complaint was filed August 1, 1985, but the proxy statement describing the plan and giving formal notice of the shareholders meeting to consider the plan was not issued until August 25, 1985. The Petitioner's speculation is unfounded. The acquisition plan was made public on May 6,

1985, and was well known to Uniroyal shareholders by August 1, 1985.

At pages 25-26 of the Petition, Petitioner argues that the settlement agreement "sealed the fate" of the class of the preferred shareholders. This is not true. First, the settlement was subject to court scrutiny and any preferred shareholder had the right to oppose the settlement or "opt out" of the class. The Petitioner complains, at page 18 of the Petition, that at the settlement hearing, the trial judge "excoriated petitioner for having dared to file objections." Again, this is not true. The trial judge extended every courtesy to Mr. Leighton, and was exceedingly patient.

The Petitioner argues, at page 31, that since the New Jersey courts have denied him standing to bring suit

to remedy CDU's alleged violation of the ICA, the Respondents are now "beyond the reach of federal law." As noted above, there was no violation of the ICA. Further, assuming arguendo, any such violation took place, the Securities and Exchange Commission may bring suit to enforce compliance under ICA § 42(e), 15 U.S.C. Sec. 80a-41(e). Anyone willfully violating the ICA is subject to a $10,000 fine and five years imprisonment. ICA § 49, 15 U.S.C. Sec. 80a-48.

The Petition contends, at pages 40-41, that Ilan K. Reich, a disbarred attorney, had been involved in the Uniroyal recognization and that Mr. Reich "may have 'leaked' the information" regarding CDU's acquisition of Uniroyal to Respondent Pogostin's attorneys. As noted above, that information

had been known to the public long before the complaint was filed.

The Petition, at page 42, challenges the amount of fees awarded to Respondent Pogostin's attorneys and to M.J. Whitman & Co., Inc., the Respondent's expert investment banker, a claim not made by Petitioner in the trial court. In this case, Respondent Pogostin's attorneys conducted extensive discovery and, at the time of settlement, the case was fully prepared for trial. The benefit to the class of $12 to $25 million was very substantial. The fee awarded represents only 2.5% of such amount. Moreover, as noted, the settlement produced benefits as great or greater than could have been obtained if the action had proceeded to trial and Respondent Pogostin prevailed. Accordingly, the record makes clear that,

based upon services rendered and results obtained, the award of legal fees was proper.

The trial court also properly exercised its discretion in awarding fees to Respondent Pogostin's investment banker. Expert's fees have been awarded in class action cases where the professional's services were necessary to prosecution of the case.[14] Thus, the fees of M.J. Whitman & Co., Inc. were properly made part of the settlement. Mr. Whitman, an investment banker and faculty member of Yale University School of Organization and Management, did an exhaustive due diligence examination of Uniroyal and the proposed transactions and settlement, and prepared a report.

---

14. See, e.g., Jezarian v. Csapo, 483 F.Supp. 385 (S.D.N.Y. 1979), where the court awarded accountant's fees of $450,000 for services rendered in a securities class action.

The fee awarded his firm was modest when compared to the fees of other investment bankers for similar services.

Finally, at page 45, of the Petition, the Petitioner contends that the New Jersey courts should have disqualified Sidney B. Silverman as one of the attorneys for Respondent Pogostin, because Mr. Silverman's firm had been required to pay costs under Rule 11, F.R. Civ. Proc. in Andre v. Merill Lynch Realty Assets Trust[15]. Mr. Silverman, a member of the New York Bar, was admitted pro hac vice under New Jersey Rule 1: 21-2. That rule provides that upon application for permission to appear pro hac vice, an attorney of another jurisdiction must submit an affidavit stating that "he is a member in good standing of the bar of the highest court

---

15. 97 F.R.D. 699 (S.D.N.Y. 1983).

of the state in which he is domiciled or has his principal office for the practice of law," that he is associated with New Jersey counsel of record qualified to practice pursuant to R. 1:21-1, that the client has requested the representation, and that there is good cause for the proposed admission. The imposition of costs or attorneys' fees against an attorney under Rule 11 does not affect such attorney's "good standing" in New York,[16] and there is record evidence of Mr. Silverman's good standing in that state at the time of his New Jersey admission. Accordingly, the sanctions imposed in Andre were not relevant to Mr. Silverman's representation of Respondent Pogostin in this action.

---

16. Respondent is unaware of any jurisdiction in which a Rule 11 violation has been held to affect standing.

CONCLUSION

For the reasons set forth above and in the decisions below, the Petition for Certiorari should be denied.

Dated: November 4, 1987

Respectfully submitted,

Sidney B. Silverman
Counsel of Record

Silverman & Harnes
135 East 36th Street
New York, New York 10016
(212) 684-3333

Klinger, Nicolette, Mavroudis
& Honig
550 Kinderkamack Road
Oradell, New Jersey 07649
(201) 262-3000

Attorneys for Plaintiff-Respondent
Bernard Pogostin

APPENDIX

APPENDIX TO BRIEF IN OPPOSITION TO CERTIORARI

TABLE OF CONTENTS

	Page
Letter of William Leighton To Sidney B. Silverman dated February 16, 1986 with attachment.	1r-3r
Stipulation of Dismissal	4r-6r

William Leighton
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

February 16, 1986

Sidney B. Silverman, Esq.
Silverman & Harnes
135 East 36th Street
New York, N.Y. 10016

Re: No. A-2522-85T6 Leighton v. Pogostin and Uniroyal, et al. Appellate Division Superior Ct., N.J.

Dear Mr. Silverman:

You have telephoned me on February 12 suggesting that I discontinue the above numbered appeal from a $600,000 judgment rendered in Chancery Court, Bergen County against Uniroyal, Inc.

(Cont. page 2)

I would be willing to discontinue the appeal if the attached proposed stipulation were agreed to by the principals for the parties to the appeal. This proposal should not be construed as abandoning the position which I have set forth in the pre-argument statement that accompanies my notice of appeal.

Uniroyal may benefit from the appeal because there is no judgment requiring it to pay $150,000 to plaintiff's expert, M.J. Whitman & Co., Inc. The judgment is for $600,000 only, representing at $200 per hour, 3,000 hours of work. Uniroyal has already benefited to the extent of some $10,000 representing interest at 7% on the $600,000 which it has not yet paid in satisfaction of the judgment.

(Cont. page 3)

Should you agree to the terms of the proposed stipulation or should you have alternative proposals, please sign and return to me this document for submission to the appellate court for action under R. 2:8-2. As I read the rule, no order of the appellate court is necessary for the approval of the stipulation.

Sincerely,

s/

William Leighton

cc: Lawrence B. Pedowitz, Esq.
John H. Hall, Esq.

STIPULATION OF DISMISSAL

Whereas, William Leighton, a stockholder of record of the First Preferred shares of appellee Uniroyal, Inc. has docketed, on February 3, 1986, an appeal from the judgment No. J 97-86 in the amount of $600,000 entered on January 2, 1986 in Chancery Court of Bergen County, Docket No. C 4115-85,

Whereas, the proceedings on this appeal may delay the implementation of the settlement approved by the said Chancery Court on November 21, 1985 by order of same date,

Whereas, the parties to this appeal recognize that the outcome cannot be predicted with certainty in light of appellant's position as outlined in his civil case pre-argument statement dated January 31, 1986, accompanying his notice of appeal,

Whereas, appellees Uniroyal, Inc. et al. recognize that appellant has expended disbursements and approximately one hundred and twenty-five hours of work preparing, filing and presenting his objections to the settlement and in preparing his notice of appeal and pre-argument statements,

NOW, therefore, it is stipulated by and between William Leighton, pro se, and the attorneys for Uniroyal, Inc. et al. as follows:

1. This appeal shall be dismissed pursuant to Rule 2:8-2 of the Rules Governing Appellate Practice in the Supreme Court and the Appellate Division of the Superior Court of New Jersey upon payment of $25,000 to William Leighton by Uniroyal, Inc. or CDU Holdings, Inc., at their option, by certified or cashier's check and upon

like payment of $250 as and for reimbursement of disbursements.

2. The signature by the parties to this appeal shall immediately render this stipulation effective and all proceedings on this appeal pending on such effective date shall then be discontinued with prejudice and without costs to either party.